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No. _____

Supreme Court, U.S.
FILED
FEB 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF OREGON

Petitioner,

v.

MARY SETTLER,
CARL SETTLER, and
RANDY ALVIN SETTLER,

Respondents.

Petition for Writ of Certiorari to the Court of Appeals of the State of Oregon

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QUESTION PRESENTED

When a state and a tribe have adopted parallel regulations limiting the off-reservation fishing rights of tribal members, and a tribal member violates those regulations, is the state required to prove the conservation necessity of its regulations in a state criminal prosecution of the tribal member?

TABLE OF CONTENTS

Page

Question Presented i

Petition for Certiorari 1

Opinions Below 1

Jurisdiction 1

Treaties, Statutes and Regulations Involved 1

Statement of the Case

I. Facts 4

II. Raising and Preserving Federal Question 5

Reasons for Allowance of Writ 7

I. The state/tribal conflict which in prior cases prompted this Court to require states to prove conservation necessity does not exist here 8

II. Tribal members who fish in violation of tribal regulations that delineate or allocate the tribe's treaty fishing right act outside of their treaty rights and are subject to prosecution under state law like other citizens 11

III. The issue presented needs definitive resolution by this Court 14

Conclusion 16

Appendix A

Oregon Court of Appeals Opinion App-1

Appendix B

Oregon Supreme Court Order App-5

TABLE OF AUTHORITIES

Page

Cases Cited

Antoine v. Washington, 420 U.S. 194 (1975) 9

Delaware Indians v. Cherokee Nation, 193 U.S. 127 (1904) 11

N. Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976) 11

Puyallup Tribe v. Dep't of Game, 391 U.S. 392 (1968) 8-9

Puyallup Tribe v. Washington Dep't of Game, 433 U.S. 165 (1977) 11,14

Sac & Fox Indians (Iowa) v. Sac & Fox Indians (Oklahoma), 220 U.S. 481 (1911) 11

Settler v. Lemeer, 507 F.2d 231 (9th Cir. 1974) 12,13

Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969) 10

State v. Gowdy, 1 Or. App. 424, 462 P.2d 461 (1969), *reh. denied* (1970) 6,13

State v. Settler, 302 Or. 461, 730 P.2d 1252 (1986) 1,7

State v. Settler, 81 Or. App. 518, 726 P.2d 410 (1986) 1,6,7

United States v. Jim, 409 U.S. 80 (1972) 11

United States v. Michigan, 12 Ind. L. Rptr. 3079 (W.D. Mich. 1985) 15

United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), *modified*, 623 F.2d 448 (6th Cir. 1980), *as modified*, 520 F. Supp. 207 (W.D. Mich. 1981), *continued as modified*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981) 15

United States v. Oregon, 657 F.2d 1009 (9th Cir. 1982) 10

United States v. Oregon, 718 F.2d 299 (9th Cir. 1983) 10

United States v. Oregon, 769 F.2d 1410 (9th Cir. 1985) 10

United States v. Washington, 384 F. Supp. 312, *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, *reh. denied*, 424 U.S. 978 (1976) 15

TABLE OF AUTHORITIES—Continued

Page

Cases Cited—Continued

United States v. Washington, 459 F. Supp. 1020 (W.D. Wa. 1978) 15

United States v. Washington, 626 F. Supp. 1405 (W.D. Wa. 1985) 15

United States v. Wheeler, 435 U.S. 313 (1978) 13

Washington Game Dep't v. Puyallup Tribe, 414 U.S. 44 (1973) 9

Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962) 12

Williams v. Lee, 358 U.S. 217 (1959) 13

Statutory and Administrative Provisions

12 Stat. 951 (1855) 1

25 U.S.C. § 2 (1982) 12

28 U.S.C. § 1257(3) (1982) 1

Or. Admin. R. 635-41-065 (1983) 3

Or. Admin. R. 635-41-075(1)(a) (1983) 3

Or. Rev. Stat. § 506.045 (1985) 2

Or. Rev. Stat. § 506.129 (1985) 2

Or. Rev. Stat. § 506.991 (1985) 3

Or. Rev. Stat. § 509.011 (1985) 2

Or. Rev. Stat. § 509.011(2)(a) (1985) 4

Yakima Tribal Ordinance, T-90-66 (1966) 3,10

Other Authorities

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982) 12

Fish & Wildlife/Law & Order Committee Action, Yakima Tribe (August 29, 1983) 4

TABLE OF AUTHORITIES—Continued

Page

Other Authorities—Continued

Fish & Wildlife/Law & Order Committee Action, Yakima Tribe (March 16, 1983) 4

Sup. Ct. R. 20 1

Sup. Ct. R. 28 1

Sup. Ct. R. 29 1

69 Interior Dec. 68 (1962) 12-13

PETITION FOR CERTIORARI

The State of Oregon respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Oregon entered in this proceeding on October 8, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing respondents' convictions is reported as *State v. Settler*, 81 Or. App. 518, 726 P.2d 410 (1986), and is attached to this petition as Appendix A. The order of the Supreme Court of the State of Oregon denying the State's petition for discretionary review of the court of appeals' decision is reported at 302 Or. 461, 730 P.2d 1252 (1986), and a copy of the order is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals of the State of Oregon was entered on October 8, 1986. The Supreme Court of Oregon denied a timely petition for discretionary review on December 30, 1986. This petition for certiorari was timely filed within 60 days of that date, pursuant to Sup. Ct. R. 20, as time is computed under Sup. Ct. R. 28 and 29. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982).

TREATIES, STATUTES AND REGULATIONS INVOLVED

1. Article 3 of the Treaty with the Yakimas of June 9, 1855, 12 Stat. 951 (1855), provides in part:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured *to said confederated tribes and bands of Indians*, as also the right of taking fish at all usual and accustomed places, *in common with citizens of the Territory* and of erecting temporary buildings for curing them; . . . .

12 Stat. at 953 (emphasis added). The reference to "said confederated tribes and bands of Indians" is to the tribes

named in the preamble of the treaty which, the preamble recites "for the purposes of this treaty, are to be considered as one nation, under the name of 'Yakama' . . . ." 12 Stat. at 951.

2. Oregon Revised Statutes [Or. Rev. Stat.] § 506.129 (1985) authorizes the Fish and Wildlife Commission of the State of Oregon to promulgate rules establishing fishing seasons, as follows:

> (1) After investigation of the supply and condition of food fish, the commission, at appropriate times each year, shall by rule:
>
> (a) Prescribe the times, places and manner in which food fish may be taken or sold, . . . and the amount of those food fish species that may be taken or sold.
>
> (b) Prescribe such other restrictions or procedures regarding the taking, selling or possessing of food fish as the commission determines will carry out the provisions of the commercial fishing laws.

3. Or. Rev. Stat. § 506.045 (1985) excludes treaty-protected fishing activity from the operation of state fishing laws and regulations, as follows:

> There are excluded from the operation of ORS 506.129, . . . any Warm Springs, Umatilla, Yakima, Wasco, Tenino, Wyum and other Columbia River Indians affiliated with these tribes and entitled to enjoy fishing rights, who have not severed their tribal relations, in so far as it would conflict with any rights or privileges granted to such Indians under the terms of the treaties made by the United States with the Warm Springs Indians on June 25, 1855, and with the Umatilla and Yakima Indians on June 9, 1855.

4. The statutory basis for this criminal prosecution is Or. Rev. Stat. § 509.011 (1985), which provides:

> (2) It is unlawful to:
>
> (a) Buy, receive, possess or sell food fish unlawfully caught during a closed season.

Or. Rev. Stat. § 506.991 (1985) provides:

> (3) Violation of any provision of ORS 509.011 which occurs more than 12 hours prior to or more than 12 hours subsequent to a season established under ORS 506.129 by the commission for the lawful taking of food fish when the total value of the food fish is $200 or more is a Class C felony.

5. Oregon Administrative Rules [Or. Admin. R.] 635-41-065 and 635-41-075(1)(a) (1983) established the 1983 commercial winter and fall fishing seasons for the Columbia River Treaty Indian Fishery as follows:

> Salmon and steelhead may be taken for commercial purposes from the Columbia River Treaty Fishery between 12 Noon, February 1 and 12 Noon, March 21, 1983.

Or. Admin. R. 635-41-065 (1983) (Ex. 1 at 7).

> (1) Salmon and steelhead may be taken for commercial purposes:
>
> (a) In the area between Bonneville Dam and McNary Dam from noon August 31 through noon September 2, 1983.

Or. Admin. R. 635-41-075(1) (1983) (Ex. 1 at 7).

6. Regulations of the Yakima Tribe for the Yakima Indian Fisheries Columbia River area are authorized by tribal ordinance, T-90-66:

> BE IT ENACTED by the Yakima Tribal Council of the Yakima Indian Tribe that *the following regulations are deemed to be necessary to promote the conservation of fishery resources* reserved to the use of the Tribe or its members by the Treaty of June 9, 1855 (12 Stat. 951).
>
> GILL NET FISHING in the Columbia River area by members of the Yakima Indian Tribe, pursuant to the rights reserved by the Treaty of 1855, shall be in accord with this ordinance and any regulations issued pursuant hereto. Nothing in this ordinance or in any such regulations shall diminish thr [*sic*] rights reserved to the Tribe and its members by said Treaty or deprive

> the Tribal Council of the right to modify, amend or repeal this ordinance or such regulations, ...

(Ex. 1 at 14, emphasis added).

By Yakima Tribal Fish and Wildlife Law and Order Committee Action dated March 16, 1983, the tribe authorized the following 1983 commercial winter fishing season:

> To extend the Columbia River Closure to Friday, March 18, 1983 at noon.

(Ex. 1 at 22).

The fall Yakima fishery resumed by Action of the Yakima Tribal Fish and Wildlife Committee dated August 29, 1983:

> Pursuant to T-90-66 and T-53-83, YIN fishermen are authorized to sell Klickitat River fish during commercial season on the Columbia River. To maintain an orderly fishery on the Klickitat River, the FRMP staff recommends the following amended season: (WED) NOON, August 31 to (SUN) NOON Sept. 4 . . . .

(Ex. 1 at 24).

STATEMENT OF THE CASE

I. Facts.

Respondents Mary Settler, Carl Settler and Randy Alvin Settler are enrolled members of the Yakima Indian Nation. As a result of an undercover operation to discover and prosecute illegal fish sellers and buyers at the wholesale level, respondents were arrested in June, 1983, when they brought a large quantity of fresh fish into downtown Portland, Oregon, and sold the fish to undercover police officers. At the time of their arrest, no commercial fishing was authorized under either state or tribal fishing regulations. Respondents were indicted for violating Or. Rev. Stat. § 509.011(2)(a) by receiving, possessing and selling food fish unlawfully caught during a closed season.

Respondents and the State of Oregon stipulated to the following facts:

> 1. Defendants, on or about June 30, 1983, at the Cosmopolitan Hotel, 1030 N.E. Union, Portland,

Oregon, County of Multnomah, State of Oregon, did *knowingly* possess or sell food fish, the value of which being more than two hundred dollars. [Emp. supplied].

2. Defendants are enrolled members of the Yakima Indian Nation.

3. The Treaty of 1855 between the Yakima Indian Nation and the United States (12 Stat. 951) as cited in ORS 506.045 is applicable.

4. The Yakima Indian Nation has validly promulgated tribal regulations pursuant to this treaty.

5. The validly promulgated tribal regulations relied upon by the State of Oregon are attached hereto as Exhibit "A."

6. The State elects to present no evidence of conservation necessity and instead relies upon *State v. Gowdy*, 1 Or App 424, 462 P2d 461 (1970) and the tribal regulations attached hereto.

7. Attached are the State of Oregon's regulations OAR 635-41-005 *et seq* promulgated pursuant to ORS 506.129.

8. One spring chinook salmon from the June 30, 1985 seizure at the Cosmopolitan Hotel had snout tag #63-17-33 identifying it as having been released in March 1979 in the Columbia River from the Ringold Hatchery in Washington State.

(C.R. at 171-72).[1] Following a trial to the court based on these stipulated facts, respondents were convicted of receiving, possessing and selling food fish out of season.

II. Raising and Preserving Federal Question.

1. Prior to trial, respondents filed a motion for discovery of the information relied upon by the State of Oregon to

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[1] References to the court record (C.R.) are from the file of *State v. Mary Settler*, trial court no. 83-07-33299. Substantially identical documents were filed in the companion cases of *State v. Carl Settler*, trial court no. 83-07-33298, and *State v. Randy Alvin Settler*, trial court no. 83-07-33295, which were consolidated on appeal with the *Mary Settler* case.

support its closure of the 1983 fishing season. (C.R. 16). They asserted that the state has a burden to prove that any restriction of their treaty right to fish is reasonable and necessary for conservation purposes. (C.R. 30). The State of Oregon opposed the motion on two grounds. First, while the state agreed that its fishing regulations must satisfy the conservation standard, it asserted that a state criminal court is not the proper forum to litigate the propriety of the regulations. (C.R. 42). Second, the state contended that it was unnecessary to comply with respondents' discovery request because respondents were not entitled to assert a treaty defense (which would give rise to a requirement to prove conservation necessity) where they had acted outside of tribal fishing regulations delineating the scope of their treaty rights. In support of this second argument, the state cited and relied on *State v. Gowdy*, 1 Or. App. 424, 427, 462 P.2d 461 (1969), *reh. denied*(1970). (C.R. 70-73). Respondents filed a memorandum urging the court not to follow *State v. Gowdy*. (C.R. 123-32). On July 3, 1984, the trial court ruled:

> I think before we even get started on that I'm going to make final determination that I am going to follow the case of *State v. Gowdy*, 1 Or. App. 424, in this case; following the rule in that case which would allow the State to proceed without proving the conservation issue if the State can prove that the season was closed by indian [*sic*] regulation at this time, ...

(Tr. 7/3/84 at 3).

2. On appeal to the Oregon Court of Appeals, respondents assigned as error the trial court's adherence to *State v. Gowdy*, as follows:

> The State failed to prove a conservation necessity and failed to prove that the defendants were acting in violation of tribal regulations.

(App. Br. 6, *State v. Settler*, 81 Or. App. 518, 726 P.2d 410 (1986)). The Oregon Court of Appeals reversed respondents'

convictions on the ground that "the state did not prove a conservation necessity in this case." *Id.* at 520.

3. The state thereafter petitioned the Oregon Supreme Court for discretionary review, urging that:

> [t]he Court of Appeals erred in holding that, in this state prosecution of Yakima Indians who sold food fish commercially during a season closed to commercial fishing under both state and tribal fishing regulations, "[i]t does not matter whether the Indians' actions were legal under tribal law; the treaty rights foreclosed the state from acting." *Settler*, *supra*, 81 Or App at 520. Their holding is based on the erroneous assumption that *in all cases* "the state may not convict a treaty Indian of taking fish out of season . . . on ceded land without proving a conservation necessity for imposing the state's laws in an area which is subject to tribal control." *Id.*

(Pet. for Rev. 1-2, *State v. Settler*, 302 Or. 461, 730 P.2d 1252 (1986) (emphasis in original)). Review was denied. *Id.*

REASONS FOR ALLOWANCE OF WRIT

The Oregon Court of Appeals has decided an important federal question which has not been, but should be, settled by this Court. It has held in this case that the state, in prosecuting off-reservation fishing proscribed both by tribal regulations and state law, must prove that the state limitations on the fishing season are justified by a conservation necessity. This conclusion is legally unsupportable and unsound as a matter of policy.

Conservation necessity is a proof requirement announced by this Court in circumstances where there has been state/tribal conflict over the nature or extent of a tribal fishing right and the state's authority to restrict that right. In this instance, as a result of federal court decision and negotiated compacts approved and supervised by the court, the state and the tribes are in agreement, not conflict. After years of state/tribal disputes over the scope of treaty fishing rights,

Oregon, several Western states, several tribes and the federal government are now under continuing federal district court supervision to ensure uniform regulation of fisheries that are protected by treaty rights. The tribes actively participate in this cooperative process. As a consequence of this process, the state and tribal regulation of fishing rights are substantially identical.

When, as here, a tribe regulates off-reservation fishing, those regulations as a matter of law delineate the scope of the treaty right. This is particularly true when, as here, the tribal regulations expressly state that they were adopted for conservation purposes. If an individual tribal member violates the tribe's regulations, he or she necessarily acts beyond the scope of the treaty right. Therefore, if the state prosecutes that individual under the parallel restrictions of state law, the tribal member has no treaty defense to assert and the state's obligation to prove conservation necessity never arises.

The Oregon court's conclusion to the contrary is legally wrong. As important, it is a bad result. Practically, given the resource limitations at the local prosecution level, many violations of state regulations will not be pursued if the state must routinely prove conservation necessity to establish a *prima facie* case. Nonenforcement or limited enforcement of Oregon's regulations threatens depletion of a shared natural resource and is, therefore, destructive to the interests of all participants in the federal court's management plan. Moreover, the cooperative efforts of many parties are frustrated and nullified, because individual tribal members remain free to assert treaty defenses in the face of the tribe's contrary delineation of the treaty rights.

I. The state/tribal conflict which in prior cases prompted this Court to require states to prove conservation necessity does not exist here.

In *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392 (1968) (*Puyallup I*), this Court declared:

> The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. . . But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

Id. at 398 (citation omitted). The "appropriate standards" requirement means that the state must demonstrate that its regulation is a "reasonable and necessary conservation measure," *Washington Game Dep't v. Puyallup Tribe*, 414 U.S. 44, 45 (1973) (*Puyallup II*), and that its application to the Indians is necessary in the interest of conservation. *Antoine v. Washington*, 420 U.S. 194, 207 (1975).

The factual predicate for the *Puyallup* line of cases was a confrontation between state laws prohibiting all off-reservation net fishing for certain species of fish and tribal assertion of treaty rights to fish with the state-prohibited gear. *Puyallup I*, 391 U.S. at 395-96; *Puyallup II*, 414 U.S. at 48-49. Similarly, in *Antoine* the state and tribe disagreed about the extent of the treaty right to hunt. *Antoine*, 420 U.S. at 207. In all of those cases, state restrictions on fishing and hunting operated to favor non-Indian sportsmen and to undermine Indian subsistence and commercial harvesting. *Puyallup I*, 391 U.S. at 396. This Court adopted the standard that state regulations limiting a treaty fishing or hunting right must be a reasonable and necessary, nondiscriminatory, conservation measure in order to strike a balance between the treaty-guaranteed subsistence rights of tribal members and the state's police power to conserve wildlife resources.

The kind of state/tribal conflict present in the *Puyallup* cases and *Antoine* does not exist in this case. Shortly after the *Puyallup I* decision, several Yakima tribal members joined

with the United States government and the Columbia River tribes to sue the State of Oregon in federal district court. They sought a decree defining their treaty right "of taking fish at all usual and accustomed places" on the Columbia River and settling the manner and extent of the State of Oregon's authority to regulate Indian fishing. That suit resulted in entry of the decision in *United States v. Oregon sub nom Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969), which began the district court's ongoing supervision of the Columbia River fishery by retaining continuing jurisdiction over state regulation of treaty rights. As part of its continuing jurisdiction, the district court in 1977, with the consent of all the parties including the tribes, adopted a management plan establishing a formal mechanism for the states of Washington and Oregon to promulgate state regulations consistent with treaty rights. *See United States v. Oregon*, 769 F.2d 1410, 1413 (9th Cir. 1985); *United States v. Oregon*, 718 F.2d 299, 303 (9th Cir. 1983); *United States v. Oregon*, 657 F.2d 1009, 1016 (9th Cir. 1982). Now, because of the tribes' active participation in that process, more often than not state regulations are adopted with the concurrence of the affected tribes. The tribes' concurrence is most clearly reflected, as in this case, by their adoption of regulations that mirror the states' regulations, including the express declaration in those regulations that they "are deemed to be necessary to promote the conservation of fishery resources." Yakima Tribal Ordinance, T-90-66 (1966).

In the *Puyallup* line of cases that prompted the requirement of proof of conservation necessity, where state and tribal regulations were in conflict, it made sense to require proof of conservation necessity before the state could exercise regulatory authority over a tribal member acting in conformance with tribal authority. That same requirement does not make sense here, where both state and tribal regulations concur to

close a treaty fishery and stipulate the very conservation necessity that might otherwise be at issue. The fundamental issue unresolved by this Court is the effect on tribal members of tribal regulation of a treaty resource. If tribal regulation of a tribal treaty right is binding on tribal members' exercise of the treaty right, then where tribal and state regulations concur to limit certain conduct, a tribal member should not be able to assert a treaty-based defense to state criminal prosecution. Absent a treaty-based defense, proof of conservation necessity is unnecessary in the state criminal proceeding. This Court's earlier holdings requiring proof of conservation necessity should, therefore, be reexamined or refined in the context of the circumstances presented in this case.

II. Tribal members who fish in violation of tribal regulations that delineate or allocate the tribe's treaty fishing right act outside of their treaty rights and are subject to prosecution under state law like other citizens.

It is well settled that treaty rights are vested in the tribe, and that the tribe allocates the use of those rights among its members. In *dicta*, this Court has recognized that treaty fishing rights are vested in the tribe and that it is the tribe's task to allocate its share of the treaty resource among tribal members. *Puyallup Tribe v. Washington Dept. of Game*, 433 U.S. 165, 178 (1977) (*Puyallup III*).

Because treaty rights vest in the tribe as a whole, tribal interests in real and personal property are communally held and an individual tribal member has no alienable or inheritable interest in the communal holding absent a federal law or treaty granting vested rights to individual members. *See, e.g., N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976); *United States v. Jim*, 409 U.S. 80, 82 (1972).[2] Accordingly, the

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[2] *See also Sac & Fox Indians (Iowa) v. Sac & Fox Indians (Oklahoma)*, 220 U.S. 481, 483-84 (1911); *Delaware Indians v. Cherokee Nation*, 193 U.S. 127, 136 (1904).

manner in which a tribe chooses to use its property can be controlled by individual members only to the extent that they participate in the governmental processes of the tribe. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 472, 605-07 (1982). *Cf. Whitefoot v. United States*, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962) (the use of accustomed fishing places is a tribal right subject to adjustment by the tribe); *Settler v. Lemeer*, 507 F.2d 231 (9th Cir. 1974) (Yakima Tribe has authority to enforce tribal members' violations of tribal fishing regulations because the fishing rights reserved in the Treaty of 1855 are communal rights of the tribe).

Thus, the tribe's regulation of its treaty right is clearly binding on tribal members for purposes of tribal enforcement. By the same rationale, the tribe's delineation of its treaty right as promulgated in a tribal fishing regulation should be binding on its members when those members attempt to assert their treaty rights against others, like the states.

This proposition is consistent with the conclusion of the United States Department of Interior, the agency charged by federal law with the "management of all Indian affairs and of all matters arising out of Indian relations," 25 U.S.C. § 2 (1982). Historically, that agency has taken the position that tribal regulation of the treaty right is binding on tribal members even in state criminal prosecutions. Memorandum Opinion No. M-36638, May 16, 1962, of the Solicitor of the United States Department of Interior, states:

> In our opinion it is clear from the foregoing that a tribe may define and regulate its treaty fishing rights. Furthermore, in so doing the tribal group may adopt ordinances to preserve and protect such fishing rights, since the tribe is not bound to set idly by while individual members commit acts amounting to confiscation or destruction of the tribe's treaty rights. By

> prescribing the manner in which the off-reservation treaty fishing right is to be exercised by its members, a tribe may afford the basis for State prosecution of Indians who fish contrary to State law in a manner which the tribe has declared to be outside the scope of the treaty right. *An Indian who is fishing outside an Indian reservation at a time or in a manner contrary to the provisions of a tribal ordinance would not be exercising the treaty right, and in this circumstance would not have such right available as a defense to a State prosecution for violation of State conservation laws.*

69 Interior Dec. 68, 70 (1962) (emphasis added).[3]

The conclusion that tribal regulations bind tribal members in a state prosecution is consistent with recognized principles of tribal sovereignty. Although, as this Court has noted, tribal sovereignty is limited in its nature, *United States v. Wheeler*, 435 U.S. 313, 323 (1978), tribal regulation of "internal affairs" is one aspect of retained tribal sovereignty. *Williams v. Lee*, 358 U.S. 217, 221-22 (1959). When and how treaty fishing rights may be exercised by tribal members is, as the Ninth Circuit has held, an "internal affair" of the tribe. *Settler v. Lameer*, 507 F.2d at 237.

The tribe's delineation and allocation of its treaty rights should be binding on its members who are prosecuted in state

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[3] The brief of the United States, *Amicus Curiae*, filed in support of the State of Oregon in the case of *State v. Gowdy, supra*, reiterated the United States' position that tribal regulation of treaty rights are binding on tribal members in state criminal proceedings and cogently identified some of the very difficult, if not impossible, inquiries that courts would have to make if treaty rights were vested in individual tribal members.

> The nearly unsuperable problems which would arise if the treaty rights were regarded as individual, rather than tribal, should settle the issue. Thus, the individuals exercising the fishing rights would have to trace the right through descent or its equivalent in Indian law (there is none that we know of in this area) back to 1855 and possibly show the extent of its exercise over that long period of years. Also, the question of alienability of the right would be injected. These and other possible ramifications negate the rights being other than tribal.

(Amicus brief at 6, *State v. Gowdy, supra*).

court. No other result is coherent policy. Either the tribe has authority to define the tribal members' exercise of a treaty right or it does not. If the tribe has the authority to bind its members, individuals who exceed tribal limits should not be entitled to assert a "treaty" defense to state prosecution under parallel regulations. Accordingly, proof of conservation necessity should not be required.

III. The issue presented needs definitive resolution by this Court.

It is imperative for this Court to settle the questions whether treaty rights belong to the tribe and whether tribal members have any treaty-secured immunity from the application of state fishing laws and regulations when identical tribal limitations restrict their treaty rights. Without a reversal of the Oregon Court of Appeals' decision, state enforcement of this shared treaty resource will be distressingly impaired. In practical terms, the burden to prove conservation necessity significantly limits the state's ability to prosecute fishing law violations. Inquiries into "conservation necessity" frequently require the production of one or several experts with an extensive background in the Columbia River fishery. In many instances, local prosecutors' offices simply do not have the staff or resources to present proofs on this intricate and specialized area. The Oregon Court of Appeals' decision thus overtly invites individual tribal members to assert individual "treaty" rights as a defense to prosecution in state court even though they act outside the scope of their treaty rights as defined by their tribe.

Protection of the Columbia River fishery is undermined in a second, more disturbing way. The state has a legitimate interest in the relationship between the tribe and its members because of its interest in the protection of a shared treaty resource. *See Puyallup III*, 433 U.S. at 178. If a tribe does not have the authority to bind its members to its regulation of the

treaty right, the effectiveness of negotiations between the states and tribes to manage the shared treaty resource will be seriously, perhaps fatally, undercut. Tribal agreements with the states to limit the use of the treaty resource, reflected in the parallel state and tribal regulations of use of that resource, will be merely precatory. That fact, of course, increases the incentive for individuals like respondents to ignore state and tribal regulations, thus threatening the destruction of the treaty resource. The many tribal nations and the several Western states which cooperatively have worked towards conservationally sound management of the Columbia River fishery share an interest in avoiding that result.

The significance of the issue far transcends this particular case. In the Columbia River treaty fishery alone, the outcome of this case will affect the interests of the States of Oregon, Washington and Idaho, the United States, and the confederated tribes of Yakima, Warm Springs, Umatilla and Nez Perce Indians. In *United States v. Washington*, 384 F. Supp. 312, *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, *reh. denied*, 424 U.S. 978 (1976), the State of Washington, the United States and as many as 24 tribes are managing the western Washington treaty fishery under the continuing jurisdiction of the federal district court. *See United States v. Washington*, 626 F. Supp. 1405 (W.D. Wa. 1985); *United States v. Washington*, 459 F. Supp. 1020 (W.D. Wa. 1978). The regulation of the Great Lakes treaty fishery is also subject to federal court supervision between the State of Michigan and several tribes. *United States v. Michigan*, 12 Ind. L. Rptr. 3079, 3089-93 (W.D. Mich. 1985); *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *modified*, 623 F.2d 448 (6th Cir. 1980), *as modified*, 520 F. Supp. 207, 211 (W.D. Mich. 1981), *continued as modified*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981).

Similarly, the State of Oregon is aware of informal negotiations between various states and tribes to coordinate nonjudicial regulation of shared treaty resources. Voluntary coordination should be encouraged for sound policy reasons. Coordination and cooperation between states and tribes, however, can only be effective if premised on tribal authority to bind its members to the joint regulations.

CONCLUSION

The question of whether and to what extent a tribal member is entitled to assert a "treaty" defense in a state enforcement proceeding based on conduct that contravenes the tribe's limitations on the exercise of treaty rights is a substantial federal question that has not been but should be addressed by this Court. Resolution of the question significantly affects the delicate balance between state and tribal efforts to manage and regulate scarce, shared treaty resources. For the reasons advanced above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of Oregon.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Respondent,
v.
MARY SETTLER,
Appellant.
(83-07-33299); CA A35093 (Control)
STATE OF OREGON,
Respondent,
v.
CARL SETTLER,
Appellant.
(83-07-33298; CA A35094)
STATE OF OREGON,
Respondent,
v.
RANDY ALVIN SETTLER,
Appellant.
(83-07-33295; CA A35095)
(Cases Consolidated)

Appeal from Circuit Court, Multnomah County.

Robert W. Redding, Judge.

Argued and submitted May 19, 1986.

Lawrence Matasar, Portland, argued the cause for appellants. With him on the brief was Hoffman, Matasar & Glaeser, Portland.

Linda DeVries Grimms, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

PER CURIAM
Reversed.
Young, J., dissenting.

PER CURIAM

Defendants are Yakima Indians. They appeal from judgments convicting them of receiving, possessing and selling food fish out of season. ORS 509.011(2)(a); 506.911(3). They assign error to the trial court's denial of their motion for judgments of acquittal. We reverse.

Defendants' primary argument is that the state may not enforce its fishing laws against treaty Indians without alleging and proving a conservation necessity for doing so. We have recently held that the state may not convict a treaty Indian of taking fish out of season or of selling a game animal on ceded land without proving a conservation necessity for imposing the state's laws in an area which is subject to tribal control. It does not matter whether the Indians' actions were legal under tribal law; the treaty rights foreclosed the state from acting. *State v. Jim (Bruce)*, 81 Or App 189, ___ P2d ___ (1986); *State v. Jim (Warner)*, 81 Or App 177, ___ P2d ___ (1986). The state did not prove a conservation necessity in this case. The court should have granted the motions for acquittal.

Reversed.

YOUNG, J., dissenting.

I dissent, because I am generally in agreement with the concurrence of Rossman, J., in *State v. Jim (Warner)*, 81 Or App 177, ___ P2d ___ (1986).

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON, Petitioner	)	
v.	)	ORDER DENYING REVIEW
SETTLER, MARY SETTLER, CARL SETTLER, RANDY ALVIN Respondents	)	CA A35093 SC S33412

The Court has considered the petition for review and ORDERS that it be denied.

DATE: DECEMBER 30, 1986.

/s/ EDWIN J. PETERSON
EDWIN J. PETERSON
CHIEF JUSTICE

[copy distribution omitted in printing]

GILLETTE, J., NOT PARTICIPATING